IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2896 OF 2003

IN

SUIT NO. 591 OF 1991

Kiritkumar R. Ajmer & Ors. .. Plaintiffs.

vs.

M/s. Venus Developers

& Ors. .. Defendants.

Mr. D.D. Madan, Sr. Adv., i/by D.G. Joshi
for plaintiffs.

Mr. Snehal Shah with M. Janardanan i/by
Narayan & Narayan for
defendant nos. 1 & 2.

Mr. D.R. Patil, representative of the Court
Receiver present.

CORAM : S.U.KAMDAR, J.

DATE : 1st February, 2006.

P.C.

. The present notice of motion is taken out for an order and direction that the defendants be directed to sell through the Courts the premises described in schedule at the price not less than what is mentioned in the valuation report prepared

by M/s. Nadkarni & Co. dated 1.9.2003. By prayer clause (b) of the motion, a direction is sought that defendants be directed to deposit in court the sum of Rs. 31,60,000/- being the value of 701 sq.ft. area given less to the Court Receiver in breach of the order dated 16.3.1992. Prayer clause (c) in the present motion is that pending the hearing and final disposal of the suit, the premises described in the schedule to the suit be protected by granting an injunction restraining the defendant no. 3 from in any manner alienating, transferring and encumbering or disposing of or otherwise dealing with, parting with possession or inducting any third party into or creating any third party right, title or interest in respect of the property described in the schedule i.e. all that premises on the ground floor, basement and premises of flat no. 301 and flat no. 502 in the building known as Venus Towers at Village Amboli Jai Prakash Road, Andheri (West), Mumbai 400 058. Some of the material facts which are necessary are briefly enumerated as under :-

2. The plaintiff has filed the present suit inter alia claiming that the development agreement dated 25.2.1988 has become voidable at the hands of the defendants and the same is validly terminated and rescinded by the plaintiff. Alternatively, the plaintiff has contended that the termination of the agreement by the plaintiff is valid and thus, there

is no valid subsisting agreement. Further consequential reliefs are sought by the plaintiffs that the Court Receiver High Court Bombay or some other fit and proper person be appointed Receiver in respect of the suit property described in Exhibit-B to the plaint and to hand over vacant and peaceful possession thereof to the plaintiff. In the aforesaid premises, the application was taken out for appointment of the Court Receiver and injunction.

3. In notice of motion No. 792 of 1991, the learned Single Judge of this Court by an order dated 16.3.1992 appointed a Court Receiver, High Court, Bombay and gave diverse direction. The learned Single Judge was of the view that prior to the filing of the suit the plaintiff having received the sum of Rs. 5,10,000/- from the defendant on account of their share under the said agreement and that the defendant no. 1 at the hearing offered further sum of Rs. 15 lacs to be withdrawn by the plaintiff and the said Rs. 15 lacs was withdrawn. Certain orders were required to be passed. The learned Judge in para 6 of the said order has observed that under the development agreement the total liability to pay was Rs. 96 lacs by the defendant no. 1 to the owners of the property and sum of Rs. 2 lacs was payable at the time of execution of lease. It was also observed in the said order that over and above the

said consideration the said agreement also provides that the built-up area of 4000 sq. ft. shall be ear-marked for disposal by the owners and the cost of construction of the said area shall be deductible from the consideration amount of Rs. 96 lacs. There is no dispute that in so far as the property is concerned, the plaintiff and the defendant no. 2 to 4 are co-owners in respect of the said property and plaintiff has 60% share in the said property. In the light of the aforesaid facts the learned Single Judge directed appointment of Court Receiver, High Court Bombay in respect of 3873.67 sq. ft. which was required to be ear-marked for disposal by the owners under clause 1(b) of the agreement. In so far as the balance consideration is concerned, the learned Single Judge further directed the defendant no. 1 to deposit a sum of Rs. 30 lacs on or before 18.6.1992 which the plaintiff will be at liberty to withdraw. It was also provided that without prejudice to his rights and contentions and subject to the agreement the defendant no. 1 shall also furnish a bank guarantee of any nationalised bank of Rs. 20 lacs in favour of the Prothonotary and Senior Master, High Court, Bombay. It was also directed that the defendant no. 1 shall file a written undertaking that he shall keep the said bank guarantee alive during the pendency of the suit. It was further provided in sub clause (f) of para 8 of the said order that in an event the defendant no. 1

fails to deposit Rs. 30 lacs, there shall be an injunction in terms of prayer (b) of the notice of motion. The said prayer (b) of the notice of motion reads thus :-

> (b) that pending the hearing and final disposal of the suit, the Defendant no. 1 by itself, its servants, agents or otherwise howsoever be restrained by an order and injunction of this Hon'ble Court from in any manner disposing of, alienating, transferring, encumbering, parting with possession of, inducting any third party into or creating any other right title or interests in favour of any third party in or in respect of or constructing or continuing to construct on the suit property described in Ex. B hereto or any part thereof or any structure constructed or to be constructed thereon or any part thereof;"

The said order of injunction was directed over and above the order of the Court Receiver which was only for the limited area of 3873.67 sq. ft. of the built up area of the suit land It was further directed that if the said amount is deposited , then there would be no order in terms of prayer clause (b) pertaining to the entire property and the same was to be operative only on failure of the defendant

no. 1 to deposit the part of the consideration of Rs. 30 lacs. There is no dispute that pursuant to the said order the Court Receiver took possession of 3873.67 sq. ft.. The plaintiff was appointed as the agent of the Court Receiver and under the terms and conditions of the order the plaintiff was required to make payment of all out-goings and other charges of the receiver including the society charges, municipal charges and keep the said premises in habitable condition. There is also no dispute that the plaintiff failed to comply with the payment of the charges to the Court Receiver as demanded by the Receiver and ultimately by an order dated 5.8.2003 passed by the Division Bench of this Court, the Court Receiver, High Court, Bombay, was discharged. The Division Bench passed further order on 20.9.2003 giving direction to the Receiver to make a report to the learned Single Judge to seek directions as to whom the possession of the suit premises which has been taken pursuant to the interim order in Notice of Motion 792 of 1991 was to be handed over. In accordance with the said directions of the Division Bench, the Court Receiver made a report to the learned Single Judge of this Court who has by an order dated 7.10.2003 has directed the Court Receiver to hand over the possession to the person from whom he has taken possession. However, the learned Single Judge took note of the fact that in the present notice of

motion, an ad-interim order of injunction restraining the defendants from alienating, encumbering, creating any third party rights in respect of the said two plots was passed by Rebello, J, and, therefore, the learned Single Judge clarified that the order passed of handing over possession will be subject to the order passed in the present notice of motion by the learned Single Judge.

4. On the aforesaid facts, the present notice of motion has come up for hearing and final disposal before me. In so far as prayer clauses (a) and (b) of the said motion are concerned, I am of the opinion that it is not possible to grant such an order at the interim stage. In the present case granting of prayers (a) and (b) would amount to partitioning the co-ownership property and determining the shares at the interim stage without the suit being finally tried and heard. The suit is not even for partition of the co-ownership rights in the said property. In that light of the matter, it is not possible to grant prayer clauses (a) and (b). However, prayer clause (c) is still required to be considered and the question is whether the plaintiff who is having 60% right in the property should be given interim protection so as to protect their rights till the hearing and final disposal of the suit. By prayer clause (c) the plaintiff is seeking

that at least the said rights should be protected so that property is available if the plaintiff succeeds in the suit and the agreement is held to be null and void. Even assuming that the plaintiff may not succeed in the suit, still the right of the plaintiff to receive 60% consideration in respect of the development agreement dated 25.2.1988 is required to be protected because under the development agreement the defendant no. 1 has agreed to make payment of certain consideration amount and also to hand over the area of 4000 sq. ft. to the original owners. The original owners are the plaintiff and the defendant nos. 2 to 4. The plaintiff has 60% share in the said area as a co-owner in respect of the property. The defendant nos. 2 to 4 are the persons who have constituted a firm being defendant no. 1 who is the builder and thus they have 40% claim in respect of the co-ownership property.

5. In so far as the aforesaid relief is concerned, the learned counsel for the defendants has contended that the plaintiff is not entitled even to the said relief in terms of prayer clause (c) of the motion. He has contended that in view of the consistent non-compliance of the orders passed by this Court meaning thereby with non-compliance with the demand of receiver to make payment of charges and consequent orders passed by this Court

of discharging the Receiver the plaintiff is not entitled to any relief in the motion and the same should be dismissed. It has ben agreed by him that in fact the suit itself is required to be struck down under the provisions of Order 39 rule 11 and the suit is required to be dismissed at this stage itself. Alternatively, he has contended that a person who has not complied with the order of this Court, is not entitled to any equitable relief in the nature of injunction in terms of prayer clause (c) of the motion and thus this Court should not grant any such interim relief. He has further contended that in any event, the plaintiff has approached this Court for seeking injunction with unclean hands and, therefore, the plaintiff is not entitled to any relief whatsoever. In so far as the aforesaid three submissions are concerned, I am of the opinion, that in view of undisputed fact that the application was made under Order 39 rule 11 of the CPC and the said application having been withdrawn by the defendant no. 1. The defendant no. 1 have abandoned the remedy initiated by themselves under order 39 rule 11 and thus it is not permissible to raise the said contention once again as defence in the present notice of motion when substantive proceedings initiated for the same relief is dismissed as withdrawn. In the light of the aforesaid, I am of the opinion that the provisions of Order 39 rule 11 are not attracted in

the present case. However, even on assumption that the defendant is entitled to the said contention in my opinion the same does not have any merits therein so as to be accepted by this Court. The said order 39 rule 11 reads as under :-

> "11. Procedure on parties, defying orders of Court and committing breach of undertaking to the Court.-- Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.
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> (2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or

> proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court."

Though under O. 39 R. 11 the Court has a discretionary power to strike of defence for non-compliance of the order passed by this Court in my opinion on the facts of the present case, I do not find any rational reason to exercise such a power under the said Order 39 rule 11. The only ground which has been complained of is the non-compliance with the payment of the charges of the Court Receiver and other out-goings which the plaintiff was definitely bound to do so under the orders passed by this Court. Such non-compliance has been already visited with the consequences by which the Receiver has been discharged and the order which was in favour of the plaintiff of appointment of the Court Receiver has already been withdrawn. In my opinion, In the aforesaid circumstances it is neither necessary nor appropriate nor in the interest of justice to dismiss the suit at this stage itself by virtue of accepting the contention of the learned counsel for the defendant no. 1 that under order 39 rule 11 for the aforesaid non-compliance of the order the suit is required to

be dismissed. In that light of the matter, I reject the contention which has been advanced by the learned counsel for defendant no. 1 in that behalf.

6. Now turning to the second contention that the plaintiff has not come with clean hands and, therefore, the plaintiff is not entitled to any relief, I am of the opinion that this is not a case of any suppression or any question of any misleading of fact or deliberate non-compliance with the orders passed by this Court. This is the case where the plaintiff has been unable to discharge the obligation to pay the charges of the Receiver and in that event the consequence of discharge of Receiver is sufficient and it is not necessary to take any further action in the matter. This leads me to the last contention of the learned counsel for the defendant that the prayer for injunction cannot be granted. In view of the fact that prayer (b) of the original notice of motion no. 792 of 1991 was n fact refused and was granted only on a condition that if the defendant no. 1 fails to deposit Rs. 30 lacs under para 8 (f) of the said order dated 3.4.1992. In the submission of the learned counsel for the defendant no. 1 that in light of the aforesaid facts, the application for interim injunction in terms of prayer clause (c) must be dismissed. The learned counsel has also made an attempt to contend that the injunction was also

sought in appellate Court as well as in Supreme Court by contending that the grounds in the memorandum of appeal and the averments in the special leave petition sought an injunction but the Courts have not granted any such injunction though sought for and, therefore, the present notice of motion should be dismissed. In so far as the aforesaid contentions are concerned, I am totally not impressed with the submission made by the learned counsel for the defendant no. 1. Firstly prayer (b) of the notice of motion does not pertain to the controversy in respect of 4000 sq. ft. for which this plaintiff is seeking injunction in the present motion. Prayer (b) which was refused conditionally was pertaining to the entire property and condition was for payment of the balance monetary consideration of Rs. 30 lacs. The said order of deposit was and/or in default injunction was granted in addition of the order of the Court Receiver for an area of 3873.67 sq. ft. Thus, the contention of the learned counsel for the defendant no.1 that prayer (b) was conditionally refused and, therefore, the present motion should be rejected cannot be accepted. Injunction prayer in the said notice of motion and injunction prayer in the present motion is totally different and based on totally different facts and, therefore, it is difficult to accept the contention of the learned counsel for defendant no. 1 and accordingly I

reject the same.

7. The last contention raised by the learned counsel for the defendant no. 1 is that by virtue of the fact that the ground raised in the memorandum of appeal and the averments made in the special leave petition seeking interim relief but the appellate court as well as Supreme Court did not grant any injunction and therefore, this Court should not entertain the said application. I am of the opinion that mere ground of appeal or averments in special leave petition against an order of discharging receiver claiming interim relief is not sufficient to hold that the appellate court and Supreme Court rejected the said application for interim reliefs. For the purpose of rejecting the application it is necessary to show that there is an application of mind by the Court and merely by inference it cannot be said that relief sought has been rejected and, therefore, the present motion should be dismissed. In the light of the aforesaid, I am of the opinion that prayer (c) of the motion is required to be granted In the aforesaid circumstances, I confirm the ad-interim order dated 7.10.2003 which is in terms of prayer clause (c) of this motion. Motion disposed of accordingly. No order as to costs.